Supreme Court, U.S.
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No. 99-48

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1998

LEWIS COUNTY , WASHINGTON; BILL BROOKS, County Assessor, Lewis County, Washington; DONNA KARVIA, Clerk, Lewis County Superior Court; JOE COOKE, Treasurer, Lewis County, Washington; GARY ZANDEL, County Auditor, Lewis County Washington, KEVIN E. MURPHY, BERNICE MURPHY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY

Of Counsel:
Jeffrey P. Helsdon
Christopher M. Constantine
3730 South Pine Street
Tacoma, WA 98409
(253) 471-1200

Douglas E. Jensen
Counsel of Record
360 NW North Street
Chehalis, WA 98532
(360) 740-1240

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REPLY

Petitioners submit the following reply to the brief of the United States of America in opposition:

The United States' interpretation of the term "taxation" in 7 USC §1984 cannot be reconciled with the Court's interpretation of that term in 15 USC §610 in *Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204, 209 (1946). The similarity in the language between 7 USC §1984 and 15 USC §610 provides "strong indication that [they] should be interpreted *pari passu*." *United States Department of Energy v. Ohio*, 503 U.S. 607, 626 (1992) (quoting *Northcross v. Memphis Board of Education*, 412 U.S. 427, 428 (1973)).

The United States, as did the Court of Appeals, misplaces reliance upon *United States v. New York Rayon Importing Company*, 329 U.S. 654 (1947).[1] The statute in question in *New York Rayon Importing Company*, former 28 USC §284(a), unlike 7 USC §1984, expressly forbade interest on any claim up to rendition by judgment

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[1] Brief for the United States in Opposition, p. 6-7; Pet App. A15.

in the Court of Claims, unless upon a contract expressly providing for the payment of interest. Further, *New York Rayon Importing Company* involves no issue of a statutory *waiver of* intergovernmental tax immunity.

Moreover, this Court's invocation in *New York Rayon Importing Company* of a narrow rule of statutory construction in favor of the sovereign was not unqualified. Rather, such a rule was properly invoked "in the absence of constitutional requirements." 329 U.S. 658. In contrast, Congress' efforts in 7 USC §1984 to reconcile the competing interests of the federal and state sovereigns compels rejection of any rule of statutory construction that would imply immunity from interest from the silence of Congress on that issue. *Graves v. New York ex rel O'Keefe*, 306 U.S. 466, 480 (1939); *California State Board of Education v. Sierra Summit, Inc.*, 490 U.S. 848, 851-52 (1989).

Equally misplaced is the United States' reliance upon *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992), *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992), and *McMahon v. United States*, 342 U.S. 252 (1951). Neither *Department of Energy*

nor *Nordic Village* nor *McMahon* involved any issue concerning a Congressional waiver of intergovernmental tax immunity.

Moreover, the United States' reliance upon *Department of Energy*, *Nordic Village* and *McMahon* rests upon the dubious premise that the doctrine of sovereign immunity is synonymous with intergovernmental tax immunity. The two doctrines are distinct. *United States v. Hynes*, 20 F.3d 1437, 1441 n. 1 (7th Cir. 1994) (en banc) (Cudahy, J. concurring).

The United States' interpretation of 7 CFR §1925.4(b) cannot be reconciled with the language of that regulation.[2] The regulation gives explicit directive to FSA's county supervisor to pay the borrower's delinquent taxes plus accrued penalty. (Pet. App. E32). That FSA might subsequently add the taxes and penalty so paid to the borrower's obligation does not detract from the clear mandate of the regulation.

By holding that the waiver of immunity in 7 USC §1984 does not extend to penalties, the Court of Appeals has impermissibly

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[2] Brief for United States in Opposition, p. 7, n. 6.

substituted its own construction of a statutory provision for a reasonable interpretation of the provision made by an administrative agency. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984); *United States v. Haggar Apparel Company*, 119 S.Ct. 1392, 1395 (1999).

The United States' invocation of a rule of strict construction of 7 USC §1984 is central to its position in these proceedings.[3] At no time in these proceedings has the United States attempted to reconcile its advocacy for such a rule with the analysis in *California State Board of Education v. Summit, Inc.*, 490 U.S. 848 (1989). *Sierra Summit* embraced a liberal construction of the waiver of tax immunity in 28 USC §960.[4] 490 U.S. 852, n. 9. Nor can the United States' construction of 7 USC §1984 by way of negative implication [5] be reconciled with *Sierra Summit*'s rejection of such reasoning in resolving issues of immunity from taxation.

The United States, as did the Court of Appeals, advocates

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[3] Brief for the United States in Opposition, p. 6-7.

[4] Pet. App. E7.

[5] Brief of the United States in Opposition, p. 6.

resolution of the issue of immunity by reference to a uniform federal rule.[6] Such a view cannot be reconciled with this Court's analysis in *Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204, 209 (1946). The view of the United States is equally at odds with the analysis in *Federal Reserve Bank v. City of Richmond*, 957 F.2d 134, 135-36 (4th Cir. 1992).

Nor does definition of the term "taxation" in 7 USC §1984 by reference to state law support the United States' position. Congress' consent to the "manner" and "extent" of "taxation" in 7 USC §1984 is not determined by whether penalties and interest are "taxes" under state law. To define "taxation" in such a manner deprives that term of its ordinary meaning as referring to "[t]he process of taxing or imposing a tax." Black's Law Dictionary (4th Ed. 1968), p. 1631.

Henry v. McKay, 164 Wash 526, 3 P.2d 145 (1931) does not control here, as the court in that case was not called upon to construe the term "taxation" in a statute.

Reconstruction Finance Corporation v. Texas, 229 F.2d 9,

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[6] Brief of the United States in Opposition, p. 7; Pet. App. A14.

cert. denied, 351 US 907 (1956), does not resolve the inquiry here. The statute in question in *Reconstruction Finance*, 15 USC §607, unlike 7 USC §1984, only gave consent to the "extent" of local taxation. 229 F.2d 11. In contrast, the consent to local "taxation" in 7 USC §1984 extends to both its "manner" and "extent." Further, *Reconstruction Finance*'s invocation of a rule of strict construction is at odds with *Beaver County* and *Sierra Summit*.

The United States' efforts to avoid the commercial activity exception to the no interest rule will not withstand scrutiny.[7] The actions of FSA and its predecessor at issue here are those of a quasi-commercial lender, not deserving of any special status. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 737-38 (1979). FSA's lending activities at issue here are no less commercial than was the issuance of insurance policies in *Standard Oil Company v. United States*, 267 U.S. 76, 79 (1925). FSA's activities in this case are no less commercial than the lending activities of the federally chartered production credit association in *Arkansas v. Farm Credit Services of*

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[7] Brief of the United States in Opposition, p. 9-10.

Arkansas, 520 U.S. 821, 831-32 (1997). *Kimbell*, *Standard Oil*, and *Farm Credit Services* render unsupportable the United States' position regarding immunity from interest, penalties and foreclosure.

The decision of the Court of Appeals violates the doctrines of federalism and separation of powers.[8] The Brief of the United States in Opposition gives scant consideration to these issues. Similarly, the United States offers no response to Petitioners' argument concerning *United States v. Alabama*, 313 U.S. 274 (1941).[9]

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted

Douglas E. Jensen
Counsel of Record
Chief Civil Deputy, Lewis County Prosecuting Attorney
360 NW North Street, MSPR001
Chehalis, WA 98532
(360) 740-1240
Counsel for Petitioner Lewis County, Washington

Of Counsel:
Jeremy Randolph
Lewis County, Washington Prosecuting Attorney
360 NW North Street
Chehalis, WA 98532
(360) 740-1240
Counsel for Petitioner Lewis County, Washington

[8] Pet. at 12-17.

[9] Pet. at 27.

Jeffrey P. Helsdon
Christopher M. Constantine
3730 South Pine Street
Tacoma, WA 98409
(253) 471-1200
Counsel for Petitioners Kevin
and Bernice Murphy